IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-1383

EDGAR WATTS, et al.,

Petitioners

v.

BAYOU LANDING, LTD., d/b/a the Florida Book Mart

Respondents

EDGAR WATTS, JR., et al.,

Petitioners

v.

OUZA, INC., d/b/a the Palace Book Mart, Excalibur Books, Inc., d/b/a The Palace Book Store

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, members of the City Council of the City of Baton Rouge, made original defendants herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered November 28, 1977, and as to which rehearing was denied on January 5, 1978.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is not yet reported. The opinion is appended hereto as Appendix A. The opinion and judgment of the United States District Court for the Middle District of Louisiana, from which appeal was taken, is not reported but is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

(1) The Court has jurisdiction to consider and grant this petition pursuant to Title 28, United States Code, Sec. 1254.

(2) The date of the original opinion below was November 28, 1977. A petition for rehearing was filed December 12, 1977, within the time provided by law and by the rules of the Court of Appeals for the Fifth Circuit, thus tolling the running of the ninety day period within which a petition for writ of certiorari could be presented to this Honorable Court. *Dept. of Banking, State of Nebraska v. Pink*, 63 S.Ct. 233, 317 U.S. 264, 87 L. Ed. 254. The petition for rehearing was denied January 5, 1978 and this petition is being filed within the time prescribed by Title 28, United States Code, Sec. 2101.

THE QUESTIONS PRESENTED

The questions presented by this petition for writ of certiorari are (1) whether the governing authority of a municipality may, by legislative action taken in the exercise of the police power, prohibit the conduct of a business involved or to be involved in the sale of admittedly obscene material, through the denial or revocation of an occupational license and/or occupancy permit without meeting administrative censorship standards as enunciated in *Freedman vs. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965);

and (2) whether the owner of such business in an evidentiary hearing may avoid dismissal of a Section 1983 action by refusing to present any evidence pertaining to the issue of obscenity, with the result that the record contains no basis upon which the Court may conclude that prior restraint has been used.

ORDINANCE PROVISIONS INVOLVED

The occupancy permit in *Bayou Landing* was withheld pursuant to City Council Resolution 5583, appended as Appendix C.

The occupational license in *Ouza* was revoked pursuant to City Council Resolution 5653 and Ordinance 3389, together appended as Appendix D.

STATEMENT OF THE CASE

Although involving separate proceedings, the two cases (*Bayou Landing*, No. 75-3632 on the docket of the United States Court of Appeals for the Fifth Circuit; and *Ouza*, No. 75-4436 on the docket of the Fifth Circuit) were considered and decided by the Fifth Circuit in one opinion (Appendix A).

Bayou Landing involved a Section 1983 complaint seeking injunctive relief from the decision of the City Council of the City of Baton Rouge, a Louisiana municipality, to deny an occupancy permit for a specific location, namely, 3919 Florida Boulevard in the City of Baton Rouge. Resolution 5583 declared the contemplated business activity to be "unsuitable for location in a residential community."

Ouza involved the revocation of certain occupational licenses, following notice and a public hearing. Resolution 5653 declared that it is to be in the public interest that the licenses be revoked, the City Council finding therein that the owners had permitted obscenity on the premises in viola-

tion of Title 9, Chapter 1, Part III, Section 62(e) of the Baton Rouge City Code.

The District Judge in *Bayou Landing* found the evidence "so filthy" as to require the evidence to be sealed. **The District Judge held that no prior restraint was involved because the materials were so "filthy" as to be beyond the protection of the First Amendment.** The Court therefore denied plaintiff's motion for preliminary and permanent injunctive relief.

In *Ouza*, certain employees of the Palace Book Mart owned by Ouza, were arrested for violation of the Louisiana obscenity laws, and the revocation proceedings followed notification by the District Attorney's office that it would be in the public interest to close the establishment.

Thereafter, on September 30, 1975, Ouza was given notice that a hearing for revocation of the occupational licenses granted to Ouza would be held at a meeting of the City Council at 5:30 o'clock p.m. on the 8th day of October, 1975. The notice given to Ouza stated that the City Council would hold a hearing on the suspension or revocation of the occupational licenses previously granted at which time, Ouza was advised that it could be present, represented by counsel if it so desired, and that the hearing was a public hearing or private at the option of Ouza. Further, Ouza was notified that it would be permitted to testify and/or present evidence in its behalf. The specific grounds of the complaint were as follows:

1. Fraud, misrepresentation, and false statements in your application for said licenses, to-wit:
   You engaged in unlawful activities on the licensed premises in violation of your authority under the said licenses, namely,

   A. Violations of La. R.S. 14:106 and (5) permitmitting acts prohibited by La. R.S. 26:285 on the licensed premises, to-wit:

2. Permitting obscenity, lewd, immoral, and/or improper entertainment, conduct, and practices on the licensed premises as described in section (A) above.

   (7) After a finding and recommendation by the District Attorney that revocation of the licenses be deemed necessary to protect the public interest based on the finding that there was prohibited activities on the licensed premises.

Ouza representatives attended the public hearing, requested and were granted a private hearing.

Pursuant to this hearing, the occupational licenses of the *Ouza* plaintiffs were revoked by the City Council. Resolution No. 5653 (Appendix D) sets forth the specific grounds for the determination of revocation of the licenses. Further, the resolution shows that a hearing was conducted in "Executive Session" of the City Council at the request of the attorney for the *Ouza* plaintiffs. No proof was offered in the District Court by the *Ouza* plaintiffs to indicate what occurred in the "executive session" hearing or to indicate the precise reason for revocation of the occupational licenses in question. For this reason, the District Judge opined that "this Court cannot conclude that illegal restraint has been used against these plaintiffs on this record as it stands."

Jurisdiction in the District Court was conferred by Title 28, U.S.C. Section 1343(3) and Title 42 U.S.C. Section 1983.

The District Court denied the *Bayou Landing - Ouza* plaintiffs' motions and the plaintiffs appealed. The Court of Appeals for the Fifth Circuit considered the cases in the context of the administrative censorship decisions (*Blount vs. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971); *Bantam Books, Inc. vs. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963), and reversed.

REASONS RELIED ON FOR GRANTING THE WRIT

THESE CASES DO NOT INVOLVE ADMINISTRATIVE CENSORSHIP. THEY INVOLVE THE EXERCISE OF THE POLICE POWER IN AN AREA OF TRADITIONAL LOCAL GOVERNMENT REGULATION, THE ISSUANCE OF OCCUPATIONAL AND OCCUPANCY LICENSES. SHOULD THE DECISION OF THE COURT OF APPEALS BE PERMITTED TO STAND, THE FEDERAL DISTRICT COURTS, IN AN EVIDENTIARY HEARING, WOULD BE POWERLESS TO ACT MERELY BECAUSE THE BUSINESS OWNER DECLINED TO PRESENT EVIDENCE. THE QUESTION PRESENTED IS, THEREFORE, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The Courts below differed sharply in their respective approaches to these cases. In the District Court, as pointed out above, the District Judge, not having been presented any evidence by the *Ouza* plaintiffs to support injunctive relief, denied that relief, stating:

> "Plaintiffs have seen fit to rest their case without the presentation of any evidence pertaining to the issue of obscenity. Apparently the plaintiffs rest their case entirely on the allegation of prior restraint, but this Court cannot conclude that illegal prior restraint has been used against these plaintiffs on this record as it stands."

In *Bayou Landing*, after an evidentiary hearing, the District Judge held that the material proposed to be sold by the plaintiff was so "filthy", "almost unbelievable", as to be beyond First Amendment protection.

The District Judge therefore applied the rule of *Miller vs. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607

that "obscene material is not protected by the First Amendment," and denied injunctive relief.

The Court of Appeals ignored the fact of an evidentiary hearing in the District Court with respect to *Bayou Landing*. The Court of Appeals ignored the fact that the *Ouza* plaintiffs had been afforded a public hearing, dismissing the hearing as a "mechanism" which merely enhanced "the opportunity of the majority to suppress distasteful but protected expression." The Court of Appeals ignored the fact that the *Ouza* plaintiffs requested that their case be heard by the City Council in "Executive Session", and further ignored the fact that the *Ouza* plaintiffs had been afforded an evidentiary hearing by the District Court, but declined to present evidence.

In reversing the District Court, the Court of Appeals apparently concluded that even in a legislative context, "the government must allow a free trade in material presumed protected until it demonstrates in court that the materials are obscene." This extends *Freeman vs. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (196) beyond the area of administrative censorship, and would require that any legislative action with respect to obscenity taken in the exercise of the police power be preceded by some kind of court determination that the legislation is necessary.

In the final analysis, however, these cases in the District Court presented the narrow issue of whether the *Bayou Landing* and *Ouza* plaintiffs had made a sufficient showing to justify injunctive relief. Under circumstances where the plaintiffs presented no evidence at the evidentiary hearing, and there was no evidence offered by *Ouza* as to matters considered in the "executive session" of the City Council, the District Judge properly concluded that "it may well be that the evidence before the City Council adequately justified whatever restraint was imposed upon the plaintiffs," justifying denial

of plaintiffs' motions for a preliminary and permanent injunction.

Thus, the *Ouza* plaintiffs were never denied access to a Courtroom in order to review the City Council's decision on the revocation of occupational license. In fact, adequate state remedies are provided for in the statutes of the State of Louisiana for an immediate appeal to be taken from the decision of the City Council to the 19th Judicial District Court in the State of Louisiana. Again, it is significant that these plaintiffs decided to proceed in United States District Court for the Middle District of Louisiana and at the hearing held by that Court offered no evidence to rebut the findings of the Council. There was moreover no evidence to support the granting of any kind of relief by the District Court, as that Court properly noted. In the *Ouza* hearing, respondent's entire presentation of evidence in that proceeding consisted of "Plaintiffs Rest".

It is submitted that Ouza's refusal to present evidence was done intentionally in an effort to avoid actual judicial determination that the materials upon which Ouza's employees were arrested, were, in fact, obscene.

In *Bayou Landing*, the plaintiffs again endeavored to avoid the results of a court determination by refusing to present any evidence. The District Court therefore found that the City Council had met its burden of proof "by the introduction as evidence in this hearing of materials that are so filthy" as to be "almost unbelievable." Such materials have no First Amendment protection, and once the District Court had pronounced them to be obscene there was no need to be further concerned with the procedural aspects of the legislative action taken by the City Council.

The Court of Appeals decision would therefore impose principles of administrative censorship upon legislative action. The Court of Appeals decision would moreover mandate the granting of injunctive relief even though the plaintiff offers no evidence to support such action by the Court. *Freedman vs. Maryland* does not require an extension of the administrative censorship standards to legislative action. And under the facts of this case, where plaintiffs had an opportunity to be heard and declined to present evidence in support of their claims, no due process question is presented.

The decision below, therefore, involves a federal question of substance, that is, the right of the District Courts to deny injunctive relief under the facts of these and similar cases. That question has not been, but should be settled by this Court.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully Submitted,

By Attorney,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing Brief have been deposited in a United States post office, first class postage prepaid, addressed as follows:

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Baton Rouge, Louisiana, this 17th day of March, 1978.

Joseph F. Keogh

Happy St. Patrick's Day
Joe

APPENDIX A

BAYOU LANDING, LTD., d/b/a the Florida Book Mart,
Plaintiff-Appellant

v.

Edgar WATTS, et al.,
Defendants-Appellees

OUZA, INC., d/b/a the Palace Book Mart,
Excalibur Books, Inc., d/b/a the Palace Book Store,
Plaintiffs-Appellants

v.

Edgar WATTS, Jr., et al.,
Defendants-Appellees

Nos. 75-3632, 75-44C6

United States Court of Appeals,
Fifth Circuit

Nov. 28, 1977

Owners of "adult" bookstores brought civil rights actions against members of city-parish council and officials of district attorney's office to recover damage for the revocation of an occupational license and the withholding of a permanent occupancy permit. The United States District Court for the Middle District of Louisiana, E. Gordon West, J., dismissed both actions, and plaintiffs appealed. The Court of Appeals, Morgan, Circuit Judge, held that: (1) city ordinance which withheld issuance of occupancy permit for "adult" bookstore could not be justified as a zoning ordinance, because it was directed as only one business, because it was not prospective, and because it recited as one of the reasons for its passage a public distaste for certain activities, rather than legislative determinations concerning public health and safety; (2) such ordinance could not be justified on general police power grounds; (3) such ordinance could not be justified on basis

of city's interest in regulating the content, rather than the form, of the communication, since no procedural safeguards were utilized in connection with such ordinance; (4) such ordinance was not saved by district court's subsequent ruling that materials sold at bookstore were obscene, and (5) once plaintiffs showed that government had restrained dissemination of materials presumed protected by First Amendment and introduced evidence tending to show that restraint was based on the content of the materials, then burden shifted to government officials to demonstrate that any restraint comported with the substantive and procedural requirements of the First Amendment.

Reversed and remanded with directions.

1. Constitutional Law — 90.1(4)

Because city ordinance which withheld issuance of occupancy permit for "adult" bookstore arguably trenched on First Amendment rights of owners of such bookstore, it was for members of city-parish council to justify it. U.S.C.A. Const. Amend. 1.

2. Zoning — 61

A city can provide that certain establishments may only operate in specified neighborhoods, or must be located a specified distance from each other, even in a First Amendment context. U.S.C.A. Const. Amend. 1.

3. Zoning — 1

Zoning connotes a nonparticularized legislative process in which rules are promulgated and land barriers designated on a general, prospective basis.

4. Zoning — 76

City ordinance which withheld issuance of occupancy permit for "adult" bookstore could not be justified as a zoning ordinance, because it was directed at only one business, instead

of being of general applicability, because it was not prospective, but acted to penalize certain establishment after it became known that it was selling certain material, and because it recited as one of the reasons for its passage a public distaste for certain activities, rather than legislative determinations concerning public health and safety. U.S.C.A. Const. Amend. 1.

5. Zoning — 76

City ordinance which withheld issuance of occupancy permit for "adult" bookstore could not be justified on general police power grounds, because it cited as a reason for the refusal of a permit "the visual advertisements on display in the front windows of these premises," and city could have commanded that the advertisements be removed without so heavily intruding upon the First Amendment rights of owners of bookstore. U.S.C.A.Const. Amend. 1.

6. Constitutional Law — 90.1(4)

City ordinance which withheld issuance of occupancy permit for "adult" bookstore could not be justified on the basis of city's interest in regulating the content, rather than the form, of the communication, since no procedural safeguards were utilized in connection with such ordinance other than a public hearing which was held before adoption of ordinance. U.S.C.A.Const. Amend. 1.

7. Constitutional Law — 90.1(4)

City ordinance which withheld issuance of occupancy permit for "adult" bookstore was not saved by district court's subsequent ruling that materials sold at bookstore were obscene, in view of fact that materials examined by district court were not from the store that was denied permit, and in view of fact that government was required to allow free trade in material presumed protected until it demonstrated in court that materials were obscene. U.S.C.A.Const. Amend. 1.

8. Civil Rights — 13.13(1)

In civil rights action brought by owners of "adult" bookstore against certain city and parish officials, challenging defendants' action in revoking occupational licenses under which bookstore had been operating, once plaintiff showed that government had restrained dissemination of materials presumed protected by First Amendment and introduced evidence tending to show that the restraint was based on the content of the materials, then burden shifted to government officials to demonstrate that any restraint imposed comported with substantive and procedural requirements of the First Amendment. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1983.

Appeals from the United States District Court for the Middle District of Louisiana.

Before MORGAN and RONEY, Circuit Judges, and KING, District Judge.*

MORGAN, Circuit Judge:

In these § 1983[1] cases, the owners of so-called adult bookstores challenged on first amendment grounds certain actions of the city-parish council of Baton Rouge and East Baton Rouge Parish, Louisiana. In No. 75-4436 (hereinafter *Ouza*), the council, spurred by the arrest of two bookstore employees on obscenity charges, revoked the occupational licenses under which an adult bookstore had been operating. In No. 75-3632 (hereinafter *Bayou Landing*), the council directed that the permanent occupancy permit for an adult bookstore be with-

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*District Judge for the Southern District of Florida, sitting by designation.

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

held, because residents of the area around the bookstore had objected to the visual displays in the windows of the store.

The district court dismissed both actions. In *Ouza* the court held in favor of the defendant-appellees[2] at the close of the bookstore owners' case. The court expressed the view that the appellants had failed to make a prima facie case. In *Bayou Landing*, the court sustained the appellees' position after an evidentiary hearing at which periodicals allegedly similar to those sold at the bookstore were introduced. The court ruled from the bench[3] that the materials were not protected by the first amendment.

We reverse.

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2. The appellees in both cases are members of the city-parish council and officials of the district attorney's office.

3. The district court stated:

[W]hen the plaintiff says that the burden of proof is on the defendants, that burden of proof has been met by the introduction as evidence into this hearing of materials that are so filthy, absolutely filthy, that it almost makes me puke — and I hope the reporter can spell that.

It has got to be the product of depraved, perverted minds that would even look at it, let alone try to sell it. And I can understand why the plaintiff did not take the witness stand to try to defend what they are doing in this case. I'm sure they would have been ashamed to have done so. They did not. If they wouldn't have been ashamed to have done so, they ought to be incarcerated some place that would be suitable for them.

As far as prior restraint is concerned, no prior restraining is involved. I don't even believe that Justice Douglas would say that this is protected by the First Amendment. This is the filthiest, nastiest stuff that you can imagine. And if the City Officials did not take steps to try to put these people out of business, they ought to be impeached. As a matter of fact, I think they ought to maybe set up a separate community for people like that and put them all together where they could enjoy each other's company, instead of letting them just pollute the whole city and state and neighborhood with this kind of stuff. This is almost unbelievable. Its got to be somebody that is perverted from head to feet to try to put this stuff any place in public.

I don't know what else I can say, except that this is so filthy that I will have to order the Clerk to seal this evidence because I could not have it on conscience to have that kind of evidence even available for the grown-up adult members of the Clerk of Court's office to have to see. And this evidence will be sealed, so if the Court of Appeals would like to see it, they can have an opportunity to see it, if this case has to be reviewed, but it certainly is not going to be open to the public; and it's not gonig to be open to the members of my court; they are not going to have to look at it, to file or anything else. It will be in an envelope under seal. It's just that filthy — and I'm not a prude, but this is the worst and is as bad as you could ever imagine.

Record 83-84.

I

Bayou Landing

In August, 1975, the city-parish council directed the local building official to withhold issuance of an occupancy permit for 3919 Florida Boulevard in Baton Rouge. Appellant Bayou Landing, Ltd. had been operating an adult bookstore at the location under temporary authority.

The record is barren of any explanation for the council's action except for the text of the resolution passed by the council ordering that the permit be withheld:

RESOLUTION 5583

AUTHORIZING AND DIRECTING THE BUILDING OFFICIAL TO WITHHOLD THE ISSUANCE OF AN OCCUPANCY PERMIT FOR THE PROPOSED USE OF THE BUILDING LOCATED AT 3919 FLORIDA BOULEVARD, BEING LOT 36, SQUARE 3, LOFASO TOWN.

WHEREAS, an application has been received requesting a permit for operation of a business enterprise designated as a book store in the building located at 3919 Florida Boulevard, being Lot 36, Square 3, Lofaso Town; and

WHEREAS, because of the visual advertisements on display in the front windows of these premises, it is felt that the type of business activity contemplated is unsuitable for location in a residential community and area such as the one in which this building is situated, and the residents and property owners in the area have formally opposed the establishment of such business concern as contemplated; and

WHEREAS, this Council believes it would be in the best public interest to withhold the issuance of an occupancy permit at this location for the proposed use:

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Baton Rouge that the Building Official is hereby authorized and directed to withhold the issuance of an occupancy permit for the proposed use of the building located at 3919 Florida Boulevard, being Lot 36, Square 3, Lofaso Town, in the City of Baton Rouge.

Record 68.

[1-4] Since the resolution arguably trenches on the plaintiff's first amendment rights it is for the defendant to justify it. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The defendant seeks to do this first, by claiming that it is in the nature of a zoning ordinance. A city clearly can provide that certain establishments may only operate in specified neighborhoods, or must be located a specific distance from each other, even in a first amendment context. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Zoning, however, connotes a non-particularized legislative process in which rules are promulgated and land areas designated on a general, prospective basis. 101 C.J.S. Zoning § 1 ("Zoning regulations are legislative, rather than judicial, in character"). Here, there are strong indications that the resolution was not a zoning ordinance. The resolution was directed at only one business, instead of being of general applicability, even though "rezoning on a piecemeal or spot basis is highly suspect." *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659, 672 (La. 1975). *See also* 101 C.J.S. Zoning § 34. The resolution was not prospective, but instead acted to penalize that establishment *after* it became known that it was selling certain material. Furthermore, it recites as one of the reasons for its pasage that "residents and property owners in the area have formally opposed the establishment of such business concern

as contemplated." This reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety again indicates that we are not dealing with zoning. In addition, the defendants have not cited any statute, ordinance, or other source defining "unsuitable for location in a residential community." At oral argument, counsel for defendants stated that the city council was authorized to act to protect the public interest. These standards for restraining the dissemination of materials such as books, magazines, and films — all of which are presumed protected by the first amendment — plainly cannot pass constitutional muster.[4] The standards would permit the government to suppress protected expression solely because the residents of the community disapproved of the content of the expression or were offended by it.[5] We also note that it was stipulated by the parties that "other establishments in the area selling the same type of material were given occupancy certificates and are in fact doing business in the City of Baton Rouge." There has been no explanation, in a zoning context, as to why the plaintiff business was singled out for unique treatment.

[5] The ordinance at issue is also sought to be justified on general police power grounds. For instance, it recites as a reason for the refusal of a permit "the visual advertisements on display in the front windows of these premises." While a governmental body might properly refuse to license some businesses because of their window advertisements, in the first amendment context it must be sure that "the restrictions are no greater than necessary or essential to the protection of the governmental interests." *Baldwin v. Redwood City*, 540 F.2d 1360, 1365 (9th Cir. 1976). *See Linmark*

4. **Interstate Circuit v. Dallas**, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (and cases cited.)

5. **See, e. g., Ergoznik v. City of Jacksonville**, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). We note that the council's action was not predicated on any carefully drawn zoning ordinance of the sort at issue in **Young v. American Mini Theatres, Inc.**, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 91, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). Here, if the true problem was plaintiff's advertisements, surely the city could have commanded that those be removed without so heavily intruding on the first amendment as it did when it refused to allow the bookstore to operate.

[6] Thus "[i]f the ordinance is to be sustained, it must be on the basis of the [city's] interest in regulating the content of the communication, and not on any interest in regulating the form." *Linmark Associates, supra*, 431 U.S. at 94, 97 S.Ct. at 1619. However, the resolution at issue cannot even be justified as straightforward administrative censorship. The Supreme Court has required that "regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . ." *Blount v. Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). There were no such safeguards in the instant case. Although the defendant argues that a public hearing was held before the resolution in question was adopted, such a mechanism merely enhances the opportunity of the majority to suppress distasteful but protected expression. The procedures envisioned by the Supreme Court are of more judicial nature.

[7] Finally, the council action is not saved by the district court's ruling from the bench that the materials sold at the bookstore were obscene. First, the materials examined by the district court were not even from the Bayou Landing store in Baton Rouge, but were purchased in Jefferson Parish. Since there is a difference between pornography and obscenity, while the material from one store might be obscene the material from the other might be protected. Second, the obligation of seeking a judicial determination of the protected or unprotected categorization of literature must be placed on the government, and the government must allow a free

trade in material presumed protected until it demonstrates in court that the materials are obscene. *See Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

We thus conclude that the plaintiff was entitled to the relief requested in No. 3632.

II
Ouza

[8] In October, 1975, the council revoked the occupational licenses that had been granted to Ouza, Inc., and Excalibur Books, Inc., for a bookstore on Plank Road in Baton Rouge. The events leading to the revocation began with the arrest of two of the bookstore's employees on obscenity charges. The district attorney for the parish wrote to the council, recommending that the store's operating authority be revoked because, in view of the arrests, revocation was necessary "to protect the public interest." Record 28. The parish clerk then sent appellants each a letter notifying them of a hearing regarding the district attorney's recommendation. A copy of the district attorney's letter was sent along with — and incorporated by reference into — the parish clerk's letter. The clerk's letter also stated that a basis for the proposed revocation was violation of the Louisiana obscenity statute.[6] A hearing was held by the council — in closed session at the request of appellants — and after the hearing the council passed a resolution[7] revoking appellants' licenses.

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6. The clerk's letter also advised appellants of alleged violations of a Louisiana statute regulating licensees of establishments selling intoxicating beverages, but the parties stipulated that this allegation was groundless. Record 62.

7. RESOLUTION 5653
AUTHORIZING AND DIRECTING THE TREASURER OF THE CITY OF BATON ROUGE AND PARISH OF EAST BATON ROUGE TO REVOKE AND SET ASIDE THE OCCUPATIONAL LICENSES ISSUED TO OUZA, INC., d/b/a THE PALACE BOOK MART, 5511 PLANK ROAD, BATON ROUGE, LOUISIANA, THROUGH ITS PRESIDENT, GERALD MATHENY, 267 MARIETTA, N.W., ATLANTA, GEORGIA AND EXCALEBAR BOOKS, INC., d/b/a THE PALACE BOOK STORE, 5511 PLANK ROAD, BATON ROUGE, LOUISIANA, THROUGH RALPH MITCHUM, 267 MARIETTA, N.W., ATLANTA, GEORGIA PURSUANT TO THE PROVISIONS OF TITLE 9, CHAPTER 1, PART III, SECTION 62, SUBSECTION (e), OF THE BATON ROUGE CITY CODE AND THE CODE OF ORDINANCES OF THE PARISH OF EAST BATON ROUGE.

WHEREAS, the District Attorney of the Parish of East Baton Rouge has determined that the public interest of the Parish of East Baton Rouge requires the revocation of the occupational licenses of Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its president, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, the specific grounds for such determination being as follows:

Title 9, Chapter 1, Part III. Section 62, Subsection (e) of the Baton Rouge City Code, as follows:

(1) Fraud, misrepresentation and false statements in application for said license, to wit: Engaged in unlawful activities on the licensed premises in violation of authority under said license, namely,

(a) Violation of La.R.S. 14:106.

(5) Permitting acts prohibited by La.R.S. 26:285 on the licensed premises, to-wit:

2. Permitting obscenity, lewd, immoral, and/or improper entertainment, conduct, and practices of the licensed premises as described in Section (a) above.

(7) After a finding and recommendation by the District Attorney that revocation of the license be deemed necessary to protect the public interest based on the following:

(b) above

Section (a) above.

and,

WHEREAS, following a hearing conducted in executive session of the City Council of the City of Baton Rouge at the option and request of Ronald Tanel, Attorney for Ouza, Inc., d/b/a The Palace Book Mart, and Excalebar Books, Inc., d/b/a The Palace Book Store, pursuant to notice of such hearing by personal service, by first class United States Mail, and by registered mail notifying the said occupational license holders of such public hearing, it is the determination of this Council that the occupational license of Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its president, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, should be revoked.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Baton Rouge that the Treasurer of the City of Baton Rouge and Parish of East Baton Rouge is hereby authorized and directed to revoke and set aside the occupational licenses issued to Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its President, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, pursuant to the provisions of Title 9, Chapter 1, Part III, Section 62, Subsection (e), of the Baton Rouge City Code and the Code of Ordinances of the Parish of East Baton Rouge. Record 23-24.

After putting the above facts before the district court in the form of stipulations or documentary evidence, appellants rested, being of the view that they had made out a

prima facie case. The district court disagreed, dismissing the case at the close of appellants' evidence. The court stated:

> Whether or not the obscenity laws of the State of Louisiana or the Parish of East Baton Rouge have been violated by the plaintiffs cannot be determined by this Court absent evidence on that issue. Plaintiffs have seen fit to rest their case without the presentation of any evidence pertaining to the issue of obscenity . . . Since the burden is upon the plaintiffs to prove their case by a preponderance of the evidence, and since the plaintiffs have failed or refused to present any evidence on the question of obscenity to this Court:
>
> IT IS ORDERED that the plaintiffs' motion for a preliminary and permanent injunction and for declaratory judgment in its favor in this case be, and it is hereby DENIED, and this case is hereby DISMISSED.

Record 65-66.

We are at a loss to understand what sort of evidence the district court thought it incumbent upon the bookstore owners to present "on the issue of obscenity." The purport of the court's opinion is that the materials are presumed obscene. On the contrary, once a plaintiff shows that the government has restrained dissemination of materials *presumed* protected by the first amendment and introduces evidence tending to show that the restraint was based on the content of the materials, then the burden shifts to the government officials to demonstrate that any restraint imposed comported with the substantive and procedural requirements of the first amendment.[8]

8. *Cf.* **Freedman v. Maryland**, 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (system of prior restraints of expression comes to court bearing heavy presumption against constitutional validity); **Bazaar v. Fortune**, 476 F.2d 570, 573 (5th Cir.)(**modified on other grounds**, 489 F.2d 225 (5th Cir. 1973) (en banc), **cert. denied**, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) (incumbent upon university to justify censorship it sought to impose on student publication).

III

The judgment in No. 75-3632 is reversed with the direction that the district court grant injunctive relief. The judgment in No. 75-4436 is reversed and the cause remanded for proceedings consistent with this opinion.[9]

REVERSED.

9. In both of these cases, appellants raise serious questions about the constitutionality of the procedures used by the city council in light of **Freedman v. Maryland**, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and, more recently, **Blount v. Rizzi**, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). Specifically, appellants argue that the city council should be judged by the same standard as an administrative censor, so that the procedural safeguards set out in **Freedman** and **Blount** should be mandated for council action. We have at least once before declined the opportunity to address similar questions, **106 Forsyth Corp. v. Bishop**, 482 F.2d 280 (5th Cir. 1973), **cert. denied**, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975). Because of the view we take of the instant cases, the **Freedman-Blount** issues again can await a later day.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
DECEMBER 11, 1975
WEST, J.

OUZA, INC., ET AL
VERSUS
EDGAR WATTS, JR., ET AL

CIVIL ACTION
NUMBER 75-422
* * * * *

This matter came on this day, pursuant to previous assignment, on plaintiffs' request for a preliminary and permanent injunction and declaratory judgment.

Plaintiffs have been engaged in the Parish of East Baton Rouge, Louisiana, in the dissemination of books, magazines, newspapers, and movie film which have, according to the plaintiffs' complaint and exhibits attached thereto, been held to be in violation of the obscenity laws of the State of Louisiana and Parish of East Baton Rouge. Plaintiffs' occupational license was apparently revoked by the Baton Rouge City Council and the reasons given therefor were that:

> "You engaged in unlawful activities on the licensed premises in violation of your authority under said license, namely,
>
> "(a) Violation of La. R. S. 14:106.
>
> "(5) Permitting acts prohobited by La. R.S. 26:285 on the licensed premises, to-wit:
>
> "2. Permitting obscenity, lewd, immoral, and/or improper entertainment, conduct, and practices on the licensed premises as described in Section (a) above."

According to the plaintiffs' complaint, and the attached exhibits, plaintiffs were notified on September 30, 1975 that a hearing for the revocation of their occupational license would be held before the City Council at 5:30 o'clock p.m. on the 8th day of October, 1975, and that at that hearing the plaintiffs would have the right to present evidence and be represented by counsel, and that the hearing would be held either publicly or privately at plaintiffs' option. Plaintiffs have stipulated that, at their option, the hearing was privately held. This notice of hearing was apparently prompted by a recommendation of the District Attorney for the Parish of East Baton Rouge, Louisiana, contained in a letter from the District Attorney to the City-Parish Council dated September 26, 1975, recommending the revocation of plaintiffs' license based upon the fact that certain employees of the plaintiffs had been arrested for violation of obscenity laws.

This Court has no way of knowing what evidence was presented to the City Council at the hearing on October 8, 1975, neither party to this present suit having favored the Court with that evidence. If the Court believed the bare allegations of the plaintiffs' complaint, it must conclude that as a result of that hearing, the revocation of plaintiffs' license was confirmed. Since the Court cannot assume that the City-Parish Council conducted an improper hearing, or that their decision was based upon inadequate evidence, it must assume that the plaintiff was given an adequate hearing before the City Council. This assumption is in no way refuted in this record. But in any event, plaintiff applied to this Court for a temporary restraining order to be directed against the City of Baton Rouge, which request was denied by this Court on October 12, 1975 on the grounds, first, that there was no irreparable damage being done, and secondly, that there was no preponderance of evidence in the record to assume that the plaintiffs could ultimately succeed in this suit. At that time this Court set the plaintiffs' request for temporary and

permanent injunction and declaratory judgment for hearing before this Court on December 11, 1975, at 10:00 a.m. All counsel were notified that this was an evidentiary hearing. When Court convened on the morning of December 11, 1975, for the purpose of holding this hearing, counsel for the defendant offered and filed in evidence a stipulation that had been entered into between the parties and thereafter, when counsel were invited by the Court to proceed with their presentation, plaintiffs' counsel announced to the Court that "Plaintiffs rest." Thereupon, this Court denied the request for a temporary and permanent injunction and for declaratory judgment, thus dismissing the suit.

It is the opinion of the Court that there is not sufficient evidence in this record to warrant the granting of a temporary or permanent injunction nor the granting of the damages sought by the plaintiffs. Indeed, upon the latter question, there is no evidence of any kind in the record. The fact that the stipulation filed in the record agrees that the plaintiffs did not violate La. R.S. 26:285 is not sufficient to justify the issuance of an injunction because violations of other State statutes have been alleged by the City of Baton Rouge. Whether or not the obscenity laws of the State of Louisiana or the Parish of East Baton Rouge have been violated by the plaintiffs cannot be determined by this Court absent evidence on that issue. Plaintiffs have seen fit to rest their case without the presentation of any evidence pertaining to the issue of obscenity. Apparently the plaintiffs rest their case entirely on the allegation of prior restraint, but this Court cannot conclude that illegal prior restraint has been used against these plaintiffs on this record as it stands. Even though the notification of revocation was apparently issued prior to the hearing before the City Council, it may well be that the evidence produced before the City Council adequately justified whatever restraint was imposed upon the plaintiffs. This Court cannot assume simply from the plaintiffs' allegations

that an improper prior restraint has been imposed. Since the burden is upon the plaintiffs to prove their case by a preponderance of the evidence, and since the plaintiffs have failed or refused to present any evidenc on th question of obscenity to this Court:

IT IS ORDERED that the plaintiffs' motion for a preliminary and permanent injunction and for declaratory judgment in its favor in this case be, and it is hereby DENIED, and this case is hereby DISMISSED.

(Signed) E. GORDON WEST
United States District Judge

Reasons for Judgment in "Bayou Landing, Ltd. d/b/a The Florida Book Mart, Plaintiff vs. Edgar Watts, et al", No. 75-329 on the docket of the United States District Court for the Middle District of Louisiana, contained in pages 14, 15 and 16 of the certified transcript of said proceedings.

"First of all, there is a motion before the Court filed by the defendants to dismiss for lack of subject matter jurisdiction; that motion is denied, because I think there is subject matter jurisdiction.

Secondly, when the plaintiff says that the burden of proof is on the defendants, that burden of proof has been met by the introduction as evidence into this hearing of materials that are so filthy, absolutely filthy, that it almost makes me puke — and I hope the reporter can spell that.

It has got to be the product of depraved, perverted minds that would even look at it, let alone try to sell it. And I can understand why the plaintiff did not take the witness stand to try to defend what they are doing in this case. I'm sure they would have been ashamed to have done so, they ought to be incarcerated some place that would be suitable for them.

As far as prior restraint is concerned, no prior restraining is involved. I don't even believe that Justice Douglas would say that this is protected by the First Amendment. This is the filthiest, nastiest stuff that you can imagine. And if the City Officials did not take steps to try to put these people out of business, they ought to be impeached. As a matter of fact, I think they ought to maybe set up a separate community for people like that and put them all together where they could enjoy each other's company, instead of letting them just pollute the whole city and state and neighborhood with this kind of stuff. This is almost unbelievable. It's got to be somebody that is perverted from head to feet to try to put this stuff any place in public.

I don't know what else I can say, except that this is so filthy that I will have to order the Clerk to seal this evidence because I could not have it on conscience to have that kind of evidence even available for the grown-up adult members of the Clerk of Court's office to have to see. And this evidence will be sealed, so if the Court of Appeals would like to see it, they can have an opportunity to see it, if this case has to be reviewed, but it certainly is not going to be open to the public; and it's not going to be open to the members of my court; they are not going to have to look at it, to file or anything else. It will be in an envelope under seal. It's just that filthy — and I'm not a prude, but this is the worst and as bad as you could ever imagine.

So for the reasons so eloquently stated in these four exhibits, those are my findings of fact and my conclusions of law; and for the reasons shown in those magazines, plaintiff's motion for preliminary and permanent injunction is denied; and I certainly hope the City Government persists in their endeavors to keep these kinds of people out of business, at least in this area.

Mr. Banta, you may take these and put them in an envelope and seal it up for whatever purposes it might serve.

Court will be at recess."

Reporter's Certificate

The undersigned in his capacity of Official Court Reporter, United States District Court, Middle District of Louisiana, hereby certifies the above and foregoing sixteen pages constitute the transcript of his original stenographic record made by him in the above entitled and numbered cause, heard in Open Court on September 18, 1975, at Baton Rouge, Louisiana, before the Honorable E. Gordon West, United States District Judge, presiding.

Baton Rouge, Louisiana
September 22, 1975

/s/Felix L. Olivier
Official Court Reporter

APPENDIX C

By Mr. Winfield

RESOLUTION 5583

AUTHORIZING AND DIRECTING THE BUILDING OFFICIAL TO WITHHOLD THE ISSUANCE OF AN OCCUPANCY PERMIT FOR THE PROPOSED USE OF THE BUILDING LOCATED AT 3919 FLORIDA BOULEVARD, BEING LOT 36, SQUARE 3, LOFASO TOWN.

WHEREAS, an application has been received requesting a permit for operation of a business enterprise designated as a book store in the building located at 3919 Florida Boulevard, being Lot 36, Square 3, Lofaso Town; and

WHEREAS, because of the visual advertisements on display in the front windows of these premises, it is felt that the type of business activity contemplated is unsuitable for location in a residential community and area such as the one in which this building is situated, and the residents and property owners in the area have formally opposed the establishment of such business concern as contemplated; and

WHEREAS, this Council believes it would be in the best public interest to withhold the issuance of an occupancy permit at this location for the proposed use:

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Baton Rouge that the Building Official is hereby authorized and directed to withhold the issuance of an occupancy permit for the proposed use of the building located at 3919 Florida Boulevard, being Lot 36, Square 3, Lofaso Town, in the City of Baton Rouge.

APPENDIX D

By Mr. Watts

RESOLUTION 5653

AUTHORIZING AND DIRECTING THE TREASURER OF THE CITY OF BATON ROUGE AND PARISH OF EAST BATON ROUGE TO REVOKE AND SET ASIDE THE OCCUPATIONAL LICENSES ISSUED TO OUZA, INC., d/b/a THE PALACE BOOK MART, 5511 PLANK ROAD, BATON ROUGE, LOUISIANA, THROUGH ITS PRESIDENT, GERALD MATHENY, 267 MARIETTA, N.W., ATLANTA, GEORGIA AND EXCALEBAR BOOKS, INC., d/b/a THE PALACE BOOK STORE, 5511 PLANK ROAD, BATON ROUGE, LOUISIANA, THROUGH RALPH MITCHUM, 267 MARIETTA, N.W., ATLANTA, GEORGIA, PURSUANT TO THE PROVISIONS OF TITLE 9, CHAPTER 1, PART III, SECTION 62, SUBSECTION (e), OF THE BATON ROUGE CITY CODE AND THE CODE OF ORDINANCES OF THE PARISH OF EAST BATON ROUGE.

WHEREAS, the District Attorney of the Parish of East Baton Rouge has determined that the public interest of the Parish of East Baton Rouge requires the revocation of the occupational licenses of Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its president, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, the specific grounds for such determination being as follows:

Title 9, Chapter 1, Part III, Section 62, Subsection

(e) of the Baton Rouge City Code, as follows:

(1) Fraud, misrepresentation and false statements in application for said license, to wit:

Engaged in unlawful activities on the licensed premises in violation of authority under said license, namely,

(a) Violation of La. R.S. 14:106.

(5) Permitting acts prohibited by La. R.S. 26:285 on the licensed premises, to-wit:

2. Permitting obscenity, lewd, immoral, and/or improper entertainment, conduct, and practices of the licensed premises as described in Section (a) above.

(7) After a finding and recommendation by the District Attorney that revocation of the license be deemed necessary to protect the public interest based on the following:

(5) above

Section (a) above.

and,

WHEREAS, following a hearing conducted in executive session of the City Council of the City of Baton Rouge at the option and request of Ronald Tanet, Attorney for Ouza, Inc., d/b/a The Palace Book Mart, and Excalebar Books, Inc., d/b/a The Palace Book Store, pursuant to notice of such hearing by personal service, by first class United States Mail, and by registered mail notifying the said occupational license holders of such public hearing, it is the determination of this Council that the occupational license of Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its President, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, should be revoked:

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Baton Rouge that the Treasurer of the

City of Baton Rouge and Parish of East Baton Rouge is hereby authorized and directed to revoke and set aside the occupational licenses issued to Ouza, Inc., d/b/a The Palace Book Mart, 5511 Plank Road, Baton Rouge, Louisiana, through its President, Gerald Matheny, 267 Marietta, N.W., Atlanta, Georgia and Excalebar Books, Inc., d/b/a The Palace Book Store, 5511 Plank Road, Baton Rouge, Louisiana, through Ralph Mitchum, 267 Marietta, N.W., Atlanta, Georgia, pursuant to the provisions of Title 9, Chapter 1, Part III, Section 62, Subsection (e), of the Baton Rouge City Code and the Code of Ordinances of the Parish of East Baton Rouge.
By Mr. Dykes

ORDINANCE 3389

Amending Title 9, Chapter 1, Part III, Section 62 of the Baton Rouge City Code and the Code of Ordinances of the Parish of East Baton Rouge so as to add thereto a new subsection 7 to subsection (e), which section 7 of subsection (e) shall read as hereinafter designated.

BE IT ORDAINED by the City Council of the City of Baton Rouge and the Parish Council of the Parish of East Baton Rouge that:

Section 1. Title 9, Chapter 1, Part III, Section 62 of the Baton Rouge City Code and the Code of Ordinances of the Parish of East Baton Rouge is hereby amended so as to add thereto a new subsection 7 to subsection (e) which shall read as follows:

"(7) An occupational license issued pursuant to this ordinance may be revoked when such action is deemed necessary to protect the public interest, and after a finding that the public interest requires such revocation by either the Parish At-

torney of the Parish of East Baton Rouge or the District Attorney of the Parish of East Baton Rouge and a recommendation for revocation of the license of any such licensee based on such public interest requirement has been made by either the Parish Attorney or the District Attorney to the City Council or the Parish Council."

Section 2. All ordinances or part of ordinances in conflict herewith are hereby repealed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1977 TERM

NO. 77-1383

EDGAR WATTS, et al.,

Petitioners

v.

BAYOU LANDING, LTD., d/b/a
the Florida Book Mart

Respondents

EDGAR WATTS, JR., et al.,

Petitioners

v.

OUZA, INC., d/b/a the Palace
Book Mart, Excalibur Books,
Inc., d/b/a The Palace Book
Store

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EUGENE SMITH
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

Counsel for Respondents

Of Counsel:
Glen Zell, Esq.
Atlanta, Georgia

TABLE OF CASES

INDEX TO BRIEF

OPINION BELOW

The decision sought to be reviewed is contained on page 11 of the Petition for Writ of Certiorari under Appendix A.

QUESTIONS RAISED

(1) WHETHER THE GOVERNING AUTHORITY OF A MUNICIPALITY MAY, BY LEGISLATIVE ACTION TAKEN IN THE EXERCISE OF THE POLICE POWER, PROHIBIT THE CONDUCT OF A BUSINESS INVOLVED OR TO BE INVOLVED IN THE SALE OF ADMITTEDLY OBSCENE MATERIAL, THROUGH THE DENIAL OR REVOCATION OF AN OCCUPATIONAL LICENSE AND/OR OCCUPANCY PERMIT WITHOUT MEETING ADMINISTRATIVE CENSORSHIP STANDARDS AS ENUNCIATED IN FREEDMAN v. MARYLAND, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965);

(2) WHETHER THE OWNER OF SUCH BUSINESS IN AN EVIDENTIARY HEARING MAY AVOID DISMISSAL OF A SECTION 1983 ACTION BY REFUSING TO PRESENT ANY EVIDENCE PERTAINING TO THE ISSUE OF OBSCENITY, WITH THE

RESULT THAT THE RECORD CONTAINS NO BASIS UPON WHICH THE COURT MAY CONCLUDE THAT PRIOR RESTRAINT HAS BEEN USED.

ARGUMENTS AND CITATIONS OF AUTHORITY

A.

A MUNICIPALITY MAY NOT, BY LEGISLATIVE ACTION IN THE GUISE OF ITS POLICE POWER, PROHIBIT THE CONDUCT OF A BUSINESS INVOLVED OR TO BE INVOLVED IN THE SALE OF SEXUALLY ORIENTED MATERIAL.

Question stated by the Petitioners is incorrect, and by this very question they invited into argument the prior restraint issue. At no time did the Respondents herein admit that all of their merchandise to be offered for sale and/or exhibition was obscene as that term has been defined by this Court in Miller v. California, 413 U.S. 15 (1973).

This Court has found in the cases of Heller v. People of the State of New York, 413 U.S. 483 (1973) and Roaden v. Commonwealth of Kentucky,

406 U.S. 905 (1972) that sexual materials are presumptively protected under the Constitution until such time as they are determined to be obscene, as that term has been variously defined by this Court.

In Bayou v. City of Kenner, 335 So. 301 (1976) the Louisiana Supreme Court held that the City of Kenner was required to issue a business license so long as the applicant complied with the ordinary licensing requirements which were not patently discriminatory and not violative of the Equal Protection Clause of the Constitution of the United States. In another case, styled Mayor and Aldermen of Savannah v. TWA, 233 Ga. 885, 214 S.E.2d 370 (1975), the Georgia Supreme Court held the City could not refuse to issue a business license because of suspicion that the applicant proposed to sell materials which some might call pornographic. The reasoning in both cases was that once the applicant had complied with all of the requirements necessary for obtaining a business license to sell sexually oriented materials, the refusal to grant the appropriate license implements Due Process and Prior Restraint arguments.

In the case at bar, the City of Baton Rouge refused to issue one of the business licenses not because the applicant did not otherwise comply, but on the sole grounds of Resolution 5583 passed by the City Council of Baton Rouge, further articulated in the opinion of the Court of Appeals. The only reason set forth in the resolution besides the general and obvious dislike for this type of business, was because of the "adults only" signs in the window which offended the sensitivities of the City Council members. The evidence of the sexual materials characterized by the judge at the district court level as "filthy," "almost unbelievable," has to be beyond the pale of the First Amendment protections, the implication being that because the store may sell material today which offends the sensitivities of a sensitive part of the community recognized as being a component of the contemporary community standards, Pinkus v. United States, ____ U.S. Law Week ____ (May 23, 1978), all such press material would be equally condemned. This factor does not authorize the foreclosure of further business activity by the proprietors of the so-called adult book stores.

In essence, what we have is that the City Council is attempting to suppress presumptively protected expression because certain vocal and sensitive residents of the community disapproved of the content of the expression or were otherwise personally offended by the material sought to be exhibited by the proprietors of the store. Compare Ergoznik v. City of Jacksonville, 422 U.S. 205 (1975). This flies in the face of the rationale of this Court in Near v. Minnesota, 283 U.S. 697-738 (1931), which prohibits the disassembly of the printing press because of past misconduct by the proprietors thereof. This is in essence the classic Prior Restraint governed by the Near case and for which Freedman v. Maryland, supra, established administrative guidelines.

Although systems of prior restraint are not unconstitutional per se, e.g. Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546, 558 (1975), they are said to bear a "heavy presumption" against their Constitutional validity. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). As the U.S. Supreme Court stated in the

Southeastern Promotions case:

> "The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."
> 420 U.S. at 558-59.

In the case of Staub v. City of Baxley, 355 U.S. 313 (1958), the Court held that an ordinance that

> "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

It is abundantly clear that by whatever name Petitioners call their attempts to shutter these two adult book store enterprises, be it the police powers or personal taste of the City Council members responding to the vocal protests of sensitive members of the community, this is a [prohibited] prior restraint and for the reasons set forth herein and in the well-reasoned opinion of the Fifth Circuit, this Petition for Certiorari should be dismissed.

B.

A PROPRIETOR OF A BUSINESS INVOLVED IN THE SALE OF PRESUMPTIVELY PROTECTED SEXUALLY ORIENTED PRESS MATERIALS IS NOT REQUIRED TO ASSUME THE BURDEN TO PROVE THE NON-OBSCENITY OF THE MATERIALS CHALLENGED BY THE CITY COUNCIL AND THEIR COUNSEL.

In the case of Freedman v. Maryland, 380 U.S. 51 (1965), Blount v. Rizzi, 400 U.S. 410 (1971) and Teitel Film Corp. v. Cusak, 390 U.S. 139 (1968), it is clear that the burden to prove obscenity is on

the censor, not on the proprietor who seeks to offer for sale such presumptively protected material. As the Circuit Court opinion makes clear on page 19 of the Petition for Certiorari, par. 7:'

> "The materials examined by the District Court condemned as 'filthy', etc., were not even from the Bayou Landing Book Store, but were purchased in Jefferson Parish."

The Court went on to say that since there is a difference between pornography and obscenity, while the material from one store might be obscene, the material from the other might be protected:

> "Second, the burden of seeking a judicial determination of the protected or unprotected categorization of literature must be placed on the government and the government must allow a free trade in material presumed protected until it demonstrates in Court that the materials are obscene."

A reading of the relevant documents in this case as set forth in the opinion of the Court makes it clear that even on Due Process considerations the

argument of counsel for Petitioners in this instance is not well taken. This counsel was present in the Court at the time of the argument in the case of Stanley v. Georgia, 399 U.S. 557 (1969), and while the Court was considering the constitutional issue of private possession of erotic materials in one's own home and whether the same is fairly protected from intrusion by law enforcement officials, the Assistant Attorney General, Robert Sparks, in oral argument, continually hammered on the point that the films involved, both by their titles and their presumed content, should be examined by the Justices of the Supreme Court before ruling on the constitutional issue presented. After Mr. Sparks stated this proposition for the tenth time, Mr. Justice Harlan raised his head from the bench, looked at counsel, and commented something to the effect: "What you are saying, Sir, is that you want our constitutional judgment dimmed by the viewing of these films".

CONCLUSION

We hereby submit that what the Petitioners are attempting to do is to raise the spectre that the materials which they purchased from stores other than those of the Respondents herein are to be comparable to materials Respondents, as proprietors of their respective book stores, proposed to sell, and for this reason there should be a judgment that the same are obscene and thus the proprietors are not entitled to procedural First Amendment protections, including protection against prior restraint, they are wrong and the Petition should be dismissed.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
1409 Peachtree Street, N. E.
Atlanta, Georgia 30309

Counsel for Respondents

Of Counsel:

GLENN ZELL, Esquire
66 Luckie Street, N. W.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, ROBERT EUGENE SMITH, Counsel for Respondents, and a member of the Bar of the United States, hereby certify that on the ____ day of June, 1978, I served three copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari on Joseph F. Keogh, Esq., Attorney for Petitioners, 326 Governmental Building, Baton Rouge, Louisiana 70821, by a duly addressed envelope with postaga prepaid.

ROBERT EUGENE SMITH